Case Number: 2208035/2016

EMPLOYMENT TRIBUNALS

Claimant		*Respondents*
Ms M Shirin	**AND**	(1) Wilson Barca LLP (2) Mr R Barca (3) Ms L Raj

HELD AT: **London Central** **ON:** 21 & 22 October 2020
23 October 2020
(in Chambers)

BEFORE: Employment Judge Pearl
Members: Mrs H Bond
Mr J Carroll

Representation*:*
For Claimant: Ms L Millin (Counsel)
For Respondent: Ms L Bone (Counsel)

REMEDY JUDGMENT ON REMITTAL

And

JUDGMENT ON PARTIES' APPLICATIONS FOR COSTS

JUDGMENT

The unanimous Judgment of the tribunal is that:

1. **The Respondents shall pay to the Claimant for injury to feelings the sum of £41,486.26, inclusive of aggravated damages (£4,000) and interest.**

2. **The Claimant shall pay costs to the Respondents in the sum of £10,000.**

3. **The Claimant's costs application is dismissed.**

REASONS

1. This was the hearing of the remitted remedy and also the parties' cross applications for costs. The original remedy judgment of 6 March 2019 was that the Respondent pay to the Claimant for injury to feelings the sum of £46,908.38 inclusive of £5,000 aggravated damages and interest. Both parties appealed. The Claimant's appeal was not permitted to proceed. The Respondent's appeal was allowed and the Appeal Tribunal ordered that the award be set aside. The issues of what award should be made for injury to feelings and whether aggravated damages should be awarded in respect of the acts of discriminatory harassment on the basis of sex (and, if so, in what amount) were remitted to this panel for rehearing.

Remitted remedy hearing: injury to feelings

2. This was not a rehearing de novo of the entire remedy. Certain of the appeal grounds were rejected, in particular, "that the Employment Tribunal had been wrong in principle to make awards for injury to feelings and of aggravated damages". (See Summary of Reasons.) It is the assessment of compensation that has been remitted. "... the remedy judgment has been found wanting in what is, in my judgment, a relatively limited respect": paragraph 68.

3. There was some debate in the Appeal as to what we meant in paragraph 53 of our remedy judgment, although the Judge did not need to resolve that issue. In that paragraph we were dealing with injury to feelings and we said that our assessment was that the case fell within the middle band of *Vento*. The debate was whether we were referring to the total sum or, alternatively, to each of the sums for age and sex harassment. We indicated to counsel at the outset of the hearing that we were able to tell them what we intended and they each agreed that we should make this clear. The tribunal's intention was that each of the two sums for each type of discriminatory conduct fell within the middle band. We were not intending to limit the total sum to the middle band.

4. We also indicated, for the assistance of the parties, that we accepted that we had overlooked the requirement to consider whether any discount should be applied, so as to avoid over-compensating the Claimant.

5. We briefly summarise the matters for which compensation falls to be assessed. The age discriminatory remarks were made by Ms Raj and in paragraph 68 of the liability decision we described this as "general denigration of the Claimant on the ground that she was either too old, alternatively not as efficient as the younger comparator." It was in respect of four matters that we upheld the age-related harassment claims. The effect of the comments was to demoralise the Claimant. (Paragraph 69.) This is quite separate from the sex-related abuse that Mr Barca directed at the Claimant. These remarks, which we do not need to repeat here, were made in January 2016 and on 24 April 2016.

As we said, there is no question that the remarks had the effect of creating a degrading and hostile environment for the Claimant.

6. As both counsel acknowledged during this latest hearing, disentangling the way in which the Claimant's feelings were injured is far from easy and, inevitably, involves a degree of artificiality in the analysis. There are three broad areas in which the Claimant's feelings were hurt. First there is the age-related harassment and, second, the sex-related abusive comments. But this all occurred over a period of months within the context of a much larger catalogue of abuse she faced from the Second Respondent. To ask whether her hurt feelings can be ascribed to the individual tortious items where we have found in her favour is inevitably a very difficult exercise for a tribunal of first instance. There is a general observation to be made. The everyday abuse from Mr Barca can be summarised as incessant swearing at the Claimant in much the same way as he swore at others who he considered had made errors, been slow or underperformed in some way. This undoubtedly caused the Claimant distress. But when he descended to specific and crude sex-related abuse, this took the matter into a different realm of hurt and is factually distinct from the everyday abuse.

7. The same is true for Ms Raj, because she did not engage in everyday swearing at the Claimant or that form of abuse. When she did make the comments that we found to be tortious she was, as Mr Barca's personal assistant, specifically undermining the Claimant's confidence and, indeed, the likelihood that she would ever obtain a training contract. In saying that she was slow because she lacked the skills of a younger person, Ms Raj was undermining the Claimant in a different way from the general abuse that the Claimant received from Mr Barca. It is therefore credible for her to assert that the tortious acts caused her specific upset and, without needing to cite details, her journal of events, where she recorded her feelings, supports that conclusion. We have no difficulty in finding on the evidence that the Second and Third Respondents at different times engaged in different types of verbal denigration that caused the Claimant specific upset and distress. It is on that basis that we made two separate awards.

8. When it came to assessing quantum, we concluded that we could not distinguish between the four remarks on the one hand and the two on the other. Our conclusion was that if the Claimant is to be compensated for the remarks of the Second Respondent it should be on the same basis as those of the Third Respondent; and vice versa. We lack any basis to distinguish between them in terms of quantum, although it is evident that we can do so in so far as the nature of the acts is concerned. What we cannot easily justify is why the award for injury to feelings, having regard to the evidence overall, should be different as between the two heads of damage.

9. We therefore adhere to our assessment of £10,000 injury to feelings, as set out in the remedy judgment and in respect of each head of claim. Where we need to go further is to look at matters overall and ask whether aggregating the two sums together produces a fair and correct result.

10. The essence of Ms Millin's argument is that we should not reduce the two sums of £10,000, largely because of the offensiveness of these comments. She goes on to submit that £10,000 was "on the low side". Ms Bone refers realistically to what she calls the "compound injury" to feelings suffered by the Claimant and says it is difficult to say which part of that related to her successful claims. She maintains the original submission that each should be assessed in the lowest *Vento* band.

11. As we have indicated, we do not agree with this latter submission having regard to the nature of the remarks in each case and the effect that they plainly had on the Claimant. We do, however, recognise that merely adding the sums together to produce an award of £20,000 carries the risk of over-compensating the Claimant. The reason is that she was working in an environment that, for different reasons, caused her upset and distress. The injury to her feelings for these tortious acts could be said to be absorbed in the overall injury to feelings that she experienced as the weeks and months went by in this office. Given that it is impossible to identify the extent to which the individual heads of claim magnified her hurt and distress in any scientific way, it is necessarily the case that the various causes of upset overlap. To aggregate the two sums of £10,000 is, therefore, to risk some element of double recovery. Put another way, we are obliged to look at the overall sum for injury to feelings so as to ensure that it is proportionate to the hurt suffered. When we look at all these matters in context, we consider that some discount should be made to reflect the facts that we have summarised and which are set out at greater length in our liability judgment.

12. Accordingly, and doing the best we can in the circumstances, we have come to the conclusion that the sum of £20,000 should be discounted by 20%, i.e £4,000, to reflect the overlap of injured feelings. In our judgment, and using the figures that are relevant to the date of the claim, the overall sum of £16,000 does justice to the Claimant under these two heads of compensation and recognises the factual intricacy of the case we are dealing with.

Aggravated damages

13. In paragraph 62 of the judgment of the Employment Appeal Tribunal, it was stated that the Second Respondent was the senior partner of the firm and the tribunal had been entitled to find that his actions in calling the Claimant a "stupid cow" and a "stupid cunt" were not only insulting, but oppressive. Accordingly, an award of aggravated damages was open to the tribunal given their respective roles.

14. Where the Respondents' appeal was upheld was in respect of the reasons we gave for the award of aggravated damages. The Appeal Tribunal stated that a tribunal must explain why the amount of basic award was insufficient to compensate the Claimant and "the extent to which the conduct that gives rise to the award of aggravated damages has increased the impact of the discriminatory act on the Claimant." It is not a punitive award. All of this is set out in **HM Prison Service v Salmon** [2001] IRLR 425. Therefore, as we see

from paragraph 24 of that judgment, the correct question is "the extent to which that [aggravating] conduct aggravated the injury to [the Claimant's] feelings."

15. We referred to the Claimant's contemporaneous journal in our original remedy decision. We have again consulted it. The first highly offensive comment was made on 24 January 2016 and the journal states, "I felt so miserable." The Claimant went on to say that in response to being abused in this way she called Mr Barca stupid. That rejoinder is an unusual one in this case and gives some indication of her immediate injury to feelings and hurt. What she said in the journal was that the comment caused her to have what she termed 'a breakdown' at the workplace and she commented in the journal: "I just don't understand how someone can shout so violently using such humiliating language …" These entries in our view amply support the conclusion that there was an aggravation to her injury to feelings.

16. The second comment, as offensive and sex-related, was made on 25 April. In her journal she said: "How can someone call an employee a 'Stupid Cow'?" She then went on to refer to the earlier insult we have referred to in the above paragraph and she continued: "No one ever called me such names." If further evidence is required, she recorded in the journal that she could not stop crying and that she cried all the way home. She sat in the park for a long time, crying. Moreover, "I sent Richard a few text messages telling him I don't like to be called stupid cow and I don't like the way he treats me." All of this supports the conclusion that the specific sexist abuse stood out from other general abuse. All of that other abuse could in one way or another be seen as part of his behaviour towards employees. But these abusive comments singled out the Claimant's gender and it is hardly surprising to this tribunal that her feelings were not only additionally hurt and damaged by the comments, but that she was able to articulate this in her own journal written at the time. There is, therefore, an evidential basis for awarding aggravated damages in our view.

17. Some adjustment needs to be made because we set the figure at 50% of the award we made in respect of Mr Barca's comments. We have now reduced the figure to a broad-brush figure £8,000 to represent this head of damages for the two comments. Therefore, we would proportionately scale down the figure of £5,000 to £4,000 for aggravated damages.

18. We reject the submission from the Respondent that the aggravation of injury to feelings comes "out of the acts themselves" and that the additional hurt is not identifiable or severable. This submission was along the lines that the global award for injury to feelings embraces all that is required; and that even though aggravated damages are available in principle, they should not be awarded. We do not accept this.

19. The essence of Ms Bone's argument is that, unlike some other cases, the aggravated damage here does not arise as something additional to the original causes of action, such as conduct by a party during the hearing. She contends that the aggravated damage arises from the very comments we have compensated for. Therefore, she submits that the effects of the injury to the Claimant's feelings have been taken into account at the first stage and there

should be no supplemental award of aggravated damages at the second stage. While this is a logical submission we would record that we have not in our primary award for injury to feelings, taken into account the specific factors that make these comments unusually oppressive. These are referred to in the appeal judgment and include the disparity in status between the parties. We have sought to deal with that aspect of the case, i.e the oppressive conduct, in the award for aggravated damages that we can legitimately make. To that extent we have sought to avoid double recovery or an infringement of the correct legal principles on remedy to which Ms Bone refers.

20. There is an allied submission that if we set injury to feelings in the middle band (the Respondent having argued for the lower band) that alone should be a reason to avoid making a further award for aggravated damages. We do not see the merit in this submission, because the assessment of injury to feelings stands on its own and does not take into account the specific aggravating factors. In our judgment the addition of £4,000 aggravated damages to compensate the additional hurt suffered by the Claimant is within the bounds of reasonableness and is relatively moderate having regard to the rest of the award. We accept that a tribunal can do no more than try to find a figure that does justice and it will always be difficult to ground such a figure in precedent or arithmetical certainty. In the view of this tribunal, this figure does justice as between the parties.

Summary

21. Thus, to summarise, we reduce our original award by a total of £5,000. The revised figures are £16,000 and £4,000 for aggravated damage. There is no challenge to the method of calculation we set out in paragraph 55 of the original remedy judgment. £16,000 is divided by 178.5 and multiplied by 264.8, to produce £23,735.57. This is then multiplied by 1.1: £26,109.13. Adding £4,000 produces **£30,109.13**. Interest (as per paragraph 64 of the judgment) is from 3 February 2016 to the new date of calculation, 23 October 2020, i.e 1724 days. At 8% p.a., interest is £11,377.13. The total of all sums is **£41,486.26**.

Costs: Respondents' application

22. Given the acrimony in the long course of correspondence between the parties, it is unsurprising that each applies for costs against the other. We deal first with the Respondents' application, formally set out in the written application dated 14 September 2020.

23. Four grounds are relied on. (a) The unreasonable rejection by the Claimant of a joint medical expert. (b) Her making a large remedy claim based on whole career loss, which was unreasonable. (c) The Claimant unreasonably refusing to cooperate with the Respondent's expert. (d) She failed to give proper disclosure of medical records.

24. Our conclusion is that three of these grounds do not justify a costs order being made, but that the second ground above is made out; and the threshold for making an award of costs has been met.

25. **Joint report.** The Respondents' application is based on **De Keyser v Wilson** [2001] IRLR 324, it being contended that the Claimant was obliged to agree to instruct a joint expert in the absence of special circumstances. The difficulty with this submission is that The EAT recognised in 2001 that the tribunal lacks powers to order the expert's costs. We also lack the detailed rules that apply in civil proceedings. If the parties have to agree about the costs, our perusal of the correspondence indicates that the prospect of such an agreement would never have been high. Beyond this, such was the suspicion that the Claimant had about the Respondents, arising out of her treatment at work, we would not characterise her stance as unreasonable. She wanted to instruct her own expert and that was a reasonable course to take.

26. **Non-cooperation.** So great is the factual dispute as to what happened when the Claimant first visited the Respondent's doctor, we find ourselves in no position to make factual findings. We give further detail when we consider the detailed correspondence under the heading of the Claimant's application. We would not go so far as to say that the Claimant has behaved unreasonably.

27. **Medical records.** The short point is that the Claimant is not responsible for the gap in the GP records that needed to be repaired during the original remedy hearing. A firm of solicitors initially dealt with this and we acquit the Claimant of subsequent misbehaviour. It might have suited her (had she taken note of it) that the GP notes were initially incomplete, but she did not bring about that state of affairs.

28. **Whole career loss.** This is not only a significant ground of criticism, but compared to the three other grounds, it puts them into the shade. We first note that the Respondents remind the tribunal of the 18 May 2018 letter sent to the parties by the Employment Judge. It was observed that the tribunal could not at that stage order the Claimant not to pursue such loss. "If it turns out to be misconceived, the Respondent has the usual remedy in costs. However, at this stage, the Claimant has not formulated a case for career loss. She has apparently said she will not work again, but that is, in terms of future loss, the submission of greatest seriousness and would always require cogent medical evidence. If she does assert such a claim with medical evidence, then the Respondent will need to consider commissioning its own evidence". The Respondents' written application notes that the career loss claim failed, indeed was never explained: paragraph 58 of the remedy judgment. Costs, they say, should follow.

29. Ms Millin for the Claimant made various oral submissions that did little to meet the Respondents' application. She said on a number of occasions that a claimant is entitled to pursue financial loss under the Equality Act. This does not deal with the Respondents' point, which is that unreasonable assertion of such a claim may lead to a costs award. She says the Claimant's expert expressed doubt over the Claimant's future, but that does not deal with the

weakness of his evidence. We dealt with this at some length in the remedy judgment. The "central issue" was causation of loss. On that question, the Claimant failed and Dr Brow's report did not, in its own terms, even advance that claim. We concluded that, but for these tortious acts, the Claimant would have resigned at the same point in time. Beyond this, the career-long loss was unexplained. Even if the Claimant had overcome problems of causation, the loss of income for the remainder of her working life was never a realistic claim. Ms Millin, inter alia, submitted that this is all a "very grey area", but, forensically, that is not the case. A claim of this type has to be grounded in evidence and this particular claim was not. The remedy claimed was bound to fail, in our view.

30. For completeness, we accept that the future loss claim was misconceived, i.e had no reasonable prospect of success. It seemed to proceed on the basis of a discriminatory dismissal, a claim that failed. We agree also that the Claimant never engaged with the narrower basis on which she succeeded, thus presenting an inflated claim. We accept that any respondent faced with a claim of this size would be bound to take it seriously and would reasonably incur costs in defending the remedy.

Costs: Claimant's application

31. The first basis for the application is that the Second Respondent had no defence to the claim. The same point appears to be made about Ms Raj and the submission is that the Respondent should pay by way of costs all the costs of instructing Dr Brow. Allied to this is the submission that failing to offer a reasonable settlement to the Claimant was unreasonable conduct. The short answers are that: (i) within the overall context of the claim as pleaded, the Second Respondent's persistence in the defence was not unreasonable; (ii) in any event, his admission of harassment would have saved no costs; and (iii) the decision to instruct Dr Brow had nothing to do with matters. The same point applies with even more force for Ms Raj. As to settlement, there is no obligation to do so and the Claimant has not sought to protect herself by an open or Calderbank offer. Ms Bone points out that the remedy claimed was vastly above the amount awarded. We see from our notes that career loss was first mentioned by Ms Millin during the liability hearing. That at some earlier stage the Claimant says she would have accepted a modest settlement is nothing to the point.

32. The further grounds for the application are that Dr Mannan and the solicitors conducted themselves unreasonably and Ms Millin took us through the relevant correspondence, principally in September 2018. As we have noted above, there is some overlap here with the counter-allegations of unreasonableness levelled by the Respondents at the Claimant.

33. The Respondent solicitors wrote in level terms to the Claimant on 6 September and Ms Millin on the 10th. No grounds for costs are asserted before 14 September. On 14 September is a reference to the third-party solicitors who were seeking medical records. On the 18th they said they regretted they could not help more generally. The Respondents instructed their expert on the 19th

(making reference to the then claim believed to total £980,000.) This letter is not criticised by the Claimant. However, Ms Millin seemed reluctant to accept that correspondence up to that point could not be relied on for the costs application. She submitted that it showed unreasonable conduct, but we fail to see where that can be identified.

34. On 26 September the Claimant told Ms Millin that she would be accompanied at the Mannan examination on 28 September by a friend who was a solicitor, but who would not be acting in a legal capacity. (Page C:23.) The next day, Ms Millin told the solicitors that "a friend" would be in attendance.

35. What happened on 28 September is greatly disputed. The Claimant's account is at page 27 in the same bundle. Dr Mannan's is at 29-30. This is the factual dispute we cannot determine. The correspondence about this involved the tribunal and it is evident from the bundle that tempers were fraying. Allegations of impropriety were exchanged. There was an urgent preliminary hearing on 12 October at which Leading Counsel appeared for the Respondents. A practical solution emerged for the Claimant's attendance at a medical examination and no orders were necessary. A date of 1 November for the examination was subsequently agreed.

36. Directions proposed in correspondence by Ms Millin were deemed 'sensible' by the Employment Judge but were opposed by the Respondents. Mr Barca at one point, on 23 October, alleged judicial bias. There is some merit in the criticism that the Respondent was engaging in unnecessary correspondence, but we doubt that any costs were incurred in consequence. In any event, further correspondence canvassed the possibility of the examination being audio recorded and its cost. The toing and froing over this occupied quite a number of emails. The outcome (page 77) was that the 1 November examination could not proceed as Dr Mannan was unwell. Ms Millin was able to stop the Claimant from setting out. In her 1 November email to the tribunal at page 80 she alleged unreasonable behaviour by the Respondent; sought a medical certificate from the Respondent's medical expert; and intimated that a costs application would be made.

37. The examination took place on 13 and 20 November and there was a further case management hearing on 16 November and 26 November by telephone. Some of the Respondent's arguments were rejected. Equally, their protest on 4 December that the medical records were incomplete proved later to be correct. The records were sent directly to Dr Mannan by the GP on 12 December: page 98. The Respondent continued to protest at the way the tribunal was managing the case.

38. On 13 December, the Employment Judge wrote to say, first, that whether there were gaps in the medical records would be sorted out at the remedy hearing (as happened.) Second, it did not appear that the Claimant was thwarting the production of the Mannan report. Third, he considered that the report could be produced in time (as also happened.) A postponement was refused and the letter concluded by noting the urgency of getting the matter into tribunal in the next week so that the full panel could adjudicate on the various

disputes. "Normally, these considerations do not arise on a remedy hearing, but the history of this remedy shows interlocutory disputes at a high and, arguably, unprecedented level of intensity."

39. Ms Millin claims £2,250 costs exclusive of VAT from September to 13 December. This has to be on the basis that all of the costs on the Claimant's side were incurred as a result of unreasonable behaviour by the Respondent, but this is untenable. A review of the chronology shows that, although there were alarms on the way, the parties managed to get from the seeking of GP notes to remedy hearing in 4 months, a time frame that also included Dr Mannan's expert report being compiled. Each party criticises the other, but we consider it would be wrong to make an order for costs because we can see no identifiable unreasonable conduct by the Respondents that led to costs being incurred. They were each highly suspicious of the other party but, in the Respondents' case, they were correct to suspect that the GP records had gaps. In other respects, their applications were rejected; but none of this is a good basis for a costs award.

40. Ms Millin advances a further ground for costs, which is bundle preparation. We intend no disrespect when we comment that we do not really understand this. Ms Millin seemingly spent time preparing the bundle, but at one point she told us did not know why or how she agreed to do this, but she did; and Mr Barca then sent her his own bundle. We recall having two bundles at the remedy hearing, indeed, this seems to be a feature of hearings in this litigation. There is no evidence on which we could fasten a costs award against the Respondents.

Costs: generally

41. We have not set out the law above. Rule 76(1)(a) provides that the threshold for a costs order is a party acting "vexatiously, abusively, disruptively or otherwise unreasonably." The tribunal must consider that this first stage is met before going on to consider whether the discretion to make an order should or should not be exercised. We acknowledge, but need not cite, the case law that counsel have referred to. In the case of the Claimant's application, the threshold is not met. In the case of the Respondents', it is met on ground 2 only.

Costs: Quantum

42. We now turn to whether the discretion to make an order should be exercised in favour of the Respondents; and, if so, in what amount. We bear in mind the principle that we should assess the nature, gravity and effect of the unreasonable conduct.

43. We must also take into account any information about means that we are given. We were at some pains to clarify this with Ms Millin. She confirmed that she and the Claimant had chosen not to put evidence about means before us. It is said she is too ill to work, but it is accepted that she will have her award to meet a costs order. Given the way in which the submissions have been made,

we ignore means entirely and do not speculate any further. For clarity, although we have seen fee notes that Ms Millin has shown us, we do not know the basis on which the Claimant will be paying for legal representation.

44. The unreasonable conduct was in making a claim for career loss after the judgment on liability was promulgated; and, then, pursuing it when the medical evidence went nowhere near supporting such a claim, given the limited basis on which the Claimant had succeeded. These two points are separate, but do not have any consequence for the costs application, because the costs sought arose after Dr Brow's report. We have to weigh in the balance the likelihood of a remedy hearing being necessary, even if career loss had not been claimed. If the claim had been put on a more reasonable basis, we suspect that a hearing would have been held, given the parties' difficulties throughout the litigation in reaching agreement and the considerable bad feeling evidenced in correspondence. We also need to bear in mind that the Respondent pursued certain applications that failed in the weeks before the remedy hearing, as well as overall proportionality. Nevertheless, the assessment of the award for costs is a difficult question.

45. The tribunal does not consider that the Claimant's award should be reduced to nil, which is the Respondents' case. They seek over £47,700. It is true that a lesser figure would be assessed and the tribunal would not consider awarding more than a proportion of the total assessed costs, were that approach to be adopted. The demerit of doing so is that it involves the parties in further, near-certain dispute about the basis of assessment. Nor would a proportion be easy for the tribunal to ascertain. We have, therefore, come to the conclusion that we should summarily assess a figure that can be funded out of the award and which will compensate the Respondents in a meaningful way for a proportion of the costs of defending the remedy. We assess that sum at **£10,000**. We are confident that that is a sum that the Respondents have properly incurred over and above the costs they would have had to meet had the Claimant behaved more reasonably in the assessment of her claim. In making this point, we note that the costs of medical and counsel fees alone are said to be a little under £20,000. Awarding about half of those claimed costs (which exclude solicitor's costs) strikes us as a fair award. Looking at the matter overall, it is also a reduction of the award that appears to the tribunal to do justice to both parties.

_____

Employment Judge Pearl

Dated: 07th Dec 2020

Reasons sent to the parties on:

07/12/2020

For the Tribunal Office